

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

LA

77-2032

To be argued by:
ALLEN M. KRANZ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSEPH COLLINS, :
Petitioner-Appellant :
- against - :
WALTER FOGG, Acting Superintendent, :
Green Haven Correctional Facility :
Respondent-Appellee :
----- -X

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P/S

77-2032

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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JOSEPH COLLINS, :

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- against - :

DOCKET NO.: 77-2032

WALTER FOGG, Acting Superintendent :
Green Haven Correctional Facility, :

Respondent-Appellee :

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On Appeal from the United States District Court
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BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a Writ of Habeas Corpus, signed on January 28, 1977, by the Honorable Thomas C. Platt, United States District Judge, Eastern District of New York. The memorandum and order are unreported and appear at page 26 of the Appendix.

In the District Court, the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

THE OPINION AND ORDER BELOW

On January 28, 1977, the United States District Court for the Eastern District of New York (Platt, J.) signed an order dismissing the petition.

The full text of the memorandum and order below appear in the Appendix for Petitioner-Appellant at page 26.

THE ISSUES PRESENTED

1. Should appellant's statements have been suppressed as made subsequent to a request for counsel and prior to an opportunity to confer with counsel?
2. Should appellant's statements have been suppressed as being involuntary?

STATEMENT OF CASE

Petitioner was indicted for rape in the first degree and assault in the third degree. On February 28, 1974, the petitioner appeared in County Court, Nassau County (Tomson, J.), for a Wade-Huntley Hearing. On March 26, 1974, the petitioner appeared for trial. He was found guilty on both charges and was sentenced on May 31, 1974, to an indeterminate term of zero to ten years on the first charge and a definite sentence of one year on the second charge to run concurrently. The conviction was affirmed without opinion on June 2, 1975, People v. Collins, 48 A.D.2d 841 (2nd Dept. 1975) (Shapiro, J., dissenting). The Court of Appeals affirmed in a memorandum opinion, 38 N.Y.2d 968 (1976).

Appellant then brought a petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District in which he contended that statements introduced at his Nassau County Court trial should have been suppressed as being both involuntary and taken subsequent to a request for the assistance of counsel. The petition was denied by memorandum and order dated January 28, 1977. On February 3, 1977, Hon. Thomas C. Platt signed an order granting appellant a Certificate of Probable Cause for appeal to this Court.

STATEMENT OF FACTS

Defendant was indicted for rape in the first degree and assault in the third degree (Indictment No. 38777). On February 28, 1974 the defendant appeared in County Court, Nassau County (Tomson, J.) for a Wade-Huntley Hearing. On March 26, 1974 the defendant appeared for trial.

WADE-HUNTLEY HEARING

EUGENIA KUSKY testified that on October 20, 1973 at approximately 5:10 A.M. Kusky and her daughter arrived at a laundromat located on North Main Street, Freeport (7, 23).^{*} After remaining approximately ten minutes inside the well-lighted laundromat, she caught a fleeting glance at Joseph Collins, the defendant, who was standing outside of the laundromat. Collins immediately walked inside, sat down next to Kusky, placed his arm around her, pushed her to the floor and started "stomping" on her head and chest for approximately six minutes with his high heeled shoes (9-11, 14, 24-26, 29, 30, 33, 35, 48). As a result of these blows, Kusky's nose began to bleed and her eyes turned black (11, 37). Collins then dragged her to a lot in the back of the laundromat (12, 33, 38-40). Although the lot was dark and unlit, Kusky was nevertheless able to see the defendant's face (40). The defendant removed the witness' clothes and placed his

^{*}Refer to Minutes of Wade-Huntley Hearing.

penis in her vagina (12, 13, 39, 40, 34). Several minutes later Kusky heard male voices and the defendant began to run toward Lena Avenue (46, 47, 56).

These male voices turned out to belong to two police officers, who proceeded to drive Eugenia Kusky in a patrol car to look for the perpetrator. Shortly afterwards, several blocks away, she saw the left profile of a man sitting approximately ten feet away in the back seat of a police car. Kusky informed the officer that this man was the rapist (18-20, 60, 65, 69, 73-75, 77, 79, 81, 82, 91). The witness was then driven to the Nassau County Medical Center, where she stayed for three and one half hours (20, 88).

At trial, the witness identified a pair of shoes, a light colored jacket and a pair of dark brown pants as the ones which the defendant had been wearing on the morning in question (16-18, 51, 52). All told, Kusky observed the defendant's face for a total of approximately seven seconds in the store and one minute in the dark lot behind the laundromat (48, 49). In addition, just prior to the witness' entering the grand jury room the police showed her a photograph of the defendant (23, 86).

CHARLES PARKER, a member of the Freeport Police Department for the past four and one half years, testified that at 5:42 A.M. on the morning of October 20, 1973 he received a radio call that a man was assaulting a woman in the vicinity of 101-A North Main Street, Freeport (94, 95, 138, 139, 153, 154). One minute later he arrived at the scene and two men pointed to the rear of the laundromat located at that address (95, 96, 139). As Police Officer Toner arrived at the scene at the same time, both

officers went to the lot where they saw Eugenia Kusky getting dressed. Kusky told Parker that she had been raped and assaulted by a Black male, approximately twenty years old, 5'6" tall, wearing a white or light colored jacket, black pants and white boots or shoes (96,97,140,141,143,144,157).

A few minutes after returning to his car, Parker saw a Black male running across Main Street carrying an object. This person soon disappeared from Parker's view (97,98,146,157,159-161,164, 165). Parker continued driving his car in search of the rapist, and a short time later observed a Black male running down a sidewalk carrying something (98,165,167,178). Parker exited from the car, pulled out his gun and ordered this person to halt and to place on the ground the white shoes he was carrying (98,99,168,169,190,191).

After placing the defendant under arrest, Parker handcuffed him and advised him of his constitutional rights (99-101,170). After asking the defendant if he understood his rights and whether he wished to answer police questions, the defendant remained silent (102,175,176). Parker, nevertheless, proceeded to ask the defendant if he had been involved in an assault with a woman. In response to this the defendant denied any knowledge whatsoever of this incident (103,176,188).

A few minutes later Police Officer Toner drove by very slowly in his car with Eugenia Kusky accompanying him as a passenger (103,181,182,193). At Freeport Police Headquarters the defendant was placed in the courtroom handcuffed to a railing while the complainant was brought into the report room (104,192). At approximately 6:20 A.M. Detective Meehan arrived and by 7:00 A.M. he had removed all of the defendant's clothing (105, 192, 195, 197-200, 204). No blood was found on the defendant's

jacket or pants, but some blood was found to be present on his shoes (202, 203). At 7:25 A.M. the defendant was transported to the First Precinct stationhouse in Baldwin (194, 203, 204).

At approximately 9:00 A.M. the defendant was handcuffed to a desk in an upstairs room and was questioned simultaneously by four detectives (108, 109, 207). In the presence of Detective Morrissey only, the defendant gave a statement after Morrissey had advised him of his rights and after the defendant had stated that he understood his rights and wished to give the police a statement (110-113, 211-214, 218, 219). The defendant then read the statement and signed it at approximately 10:15 A.M. This statement was immediately countersigned by Officers Parker and Morrissey (113, 114, 219, 230-233).

The defendant remained in the same room for three more hours, until approximately 12:00 noon, when Detective Mazyck returned and advised the defendant of his rights and of the fact that Cynthia Goodson had not corroborated his alibi statement given earlier to Detective Morrissey (117, 118, 234, 235). Mazyck then advised the defendant of his rights (236, 237). The defendant stated that he wished to change his statement and he gave the police a second statement (118, 119, 238). The defendant read it and signed it at approximately 12:30 P.M. (119, 239).

At 2:44 P.M. Parker brought the defendant to Mineola Police Headquarters for fingerprinting and photographs (121, 122). When the defendant arrived at the main police desk he stated that he had back pains and wished to see a doctor (123). Parker then transported him to the Nassau County Medical Center for observation (123).

Officer Parker denied ever having struck or threatened the defendant. He also stated that the defendant was never struck in his presence-(123, 124, 220. 228). Finally, Parker did not recall having seen a bruise or redness above either of the defendant's eyes (940).

JOHN MEEHAN testified that at 6:20 A.M. on the morning of October 20, 1973 he saw the defendant in a courtroom in Freeport. The defendant, who was handcuffed and chained to a slot in the courtroom, was dry-heaving and appeared to be intoxicated (690, 691, 704-706, 721, 722). After Meehan advised the defendant of his rights, the defendant stated that he understood them and he denied his guilt (692. 693, 706, 707).

Later that day, at approximately 1:30 P.M., Meehan saw the defendant at the First Precinct stationhouse, sitting handcuffed to a chair in the coffee room, talking to Detective Mazyck, who was typing up a statement. The defendant was not struck in Meehan's presence nor did the defendant make any complaint to him about his being beaten. Further, Meehan did not observe any blood on the defendant at any time (695, 697, 698).

JOSEPH MORRISSEY, a seven year veteran of the Nassau County Police Department, arrived at the First Precinct stationhouse at approximately 9:10 A.M. on October 20, 1973 and saw the defendant sitting handcuffed in the coffee room being questioned by Police Officers Furno and Woessner (250, 256). Officers Parker and Mazyck were also present (248, 249, 256). A short while later Morrissey himself entered into the questioning.

Morrissey proceeded to advise the defendant of his constitutional rights and ask him if he understood them. The defendant replied in the affirmative (251, 262, 263). In response to Morrissey's questions the defendant told the witness that he had been drinking the night before at the Tropicana Bar in Freeport and that at approximately 4:00 A.M. he left the bar and went to his girlfriend's house in Freeport, had intercourse with her, left at 5:00 A.M., walked past the laundromat, saw the complainant, assaulted her and had intercourse with her (251, 252, 253, 268, 269, 279, 283). Morrissey reduced this statement to writing, which the defendant signed (253, 268, 269).

STANLEY MAZYCK, a member of the Nassau County Police Department for the past seven years, saw the defendant in the squad room of the First Precinct in the company of five police officers at approximately 9:00 A.M. on October 20, 1973 (284). In Mazyck's presence, Morrissey questioned the defendant. Later, after reading the defendant's statement made to Morrissey (286, 287, 294), Mazyck had an officer pick up the defendant's girlfriend, one Cynthia Goodson, and bring her to the police station. Mazyck then took a statement from this young woman which appeared to contradict the defendant's statement (288, 298). It was at this point that the witness first advised the defendant of his rights (289, 290). After stating that he

understood his rights and that he wished to make a statement, the defendant did in fact give an oral statement which Mazyck reduced to writing (290). The defendant read this statement out loud and signed it sometime between 12:00 noon and 12:30 P.M. (294). The witness denied ever having struck the defendant (799).

VINCENT TONER, a member of the Freeport Police Department, testified that on October 20, 1973 at approximately 5:42 A.M. he was directed to proceed to 161-A North Main Street (325, 326). After exiting from his car on Lena Street, he went to the rear of 161-A North Main Street where he was joined by Officer Parker (329, 340). In the lot he observed a woman with her clothes in a state of disarray (326-328, 341). This woman, Eugenia Kusky, who was bleeding around the face and on her clothes, told Toner that she had been beaten and raped by a thin Black male, approximately twenty years of age, 5'6" tall, who was wearing either a white or light colored jacket, dark trousers and white shoes or boots (329, 343, 344, 358, 364). Toner then drove this woman in his car in pursuit of the rapist (330, 345).

At approximately 5:50 A.M. the witness received a call from Police Officer Parker to proceed to the corner of Milton and Jay Streets to observe a suspect. As Toner slowly drove his car past this dark corner, he asked the woman, Eugenia Kusky, to look inside the parked car they were passing. Several seconds later she told Toner that the suspect was the rapist (349, 350, 359). In court, Toner identified this suspect as the defendant (347).

Toner later transported the defendant to Police Headquarters in Mineola to be photographed and fingerprinted (389). Upon his arrival there, the defendant told the desk sergeant that he wished to make a complaint about his physical condition, particularly in regard to back pains (390-392). Soon after, Toner drove the defendant to the Nassau County Medical Center (392, 393).

TAHOURES FIROOZI, M.D., testified for the defendant that he was a resident medical doctor in urology in the Nassau County Medical Center (472). At approximately 4:00 P.M. on October 20, 1973 he examined the defendant in the emergency room of the hospital and found a small hematoma in the defendant's left eyebrow approximately two and a half centimeters in length and CVA (flank) tenderness on his body. The hematoma was a relatively fresh injury because of the presence of blood on the injury (473, 474, 481-483, 498, 499, 503-505, 510).

Moreover, a pathologist conducted a urine test on the defendant which revealed the presence of red blood cells in the defendant's urine (474, 475, 484). While the presence of red blood cells in the urine could ordinarily be due to infection, tumor, or trauma, in the defendant's case they could not have been caused by infection as there were no white blood cells present in the defendant's urine (475). Neither were the red blood cells caused by a tumor as an X-ray of the defendant's kidney was normal (476). Thus, a physical beating was most probably the cause of the presence of red blood cells in the defendant's urine (476, 477). And such a beating would probably have been a recent one (508). Also, the defendant's prior

injuries which he had sustained in the Army definitely could not have caused the presence of red blood cells in the urine (506, 507, 509). Finally, while a severe trauma might in some cases produce damage to the bladder, kidney or ureter, this would not occur in all cases. Thus, there could very likely be instances where severe beatings occurred and there would be no indications of damage to these organs (513, 515, 516).

JOSEPH COLLINS testified that in the early morning hours of October 20, 1973 he was walking to his home from the Living Room Bar, located on Merrick Road in Freeport, when he halted at the corner of Seaman Avenue and Jay Street in response to a command from Police Officer Parker (415, 529). Parker handcuffed him, placed him in his patrol car and drove him to the corner of Milton and Jay Streets (416, 419). Soon after, on the way to the Baldwin Police Station, Officer Toner and Parker began to beat up the defendant, who was seated in the rear seat of the police car, using blackjacks and night sticks. And, as a result of this beating the defendant received numerous body bruises and a bloodshot eye (416, 421, 435-437, 456, 531, 532, 543-546).

Once inside the First Precinct station house several police officers handcuffed the defendant to a chair. Officers Parker and Toner again beat the defendant, and, as a result, bloodied his nose and cut his right temple. Other officers then completely removed his clothes (422, 423, 430-436, 558, 560, 561, 575, 577, 578, 581, 584-588, 593, 594, 596, 942). Shortly thereafter, Detective Morrissey entered the room and told the defendant that if he did not admit to raping a woman

the other police officers would kill the defendant (424, 439, 647, 652). At this point, officers Parker, Toner, Mazyck and another officer, later identified by the defendant as Detective Sergeant Lloyd, reentered the room and assaulted the defendant. Detective Sergeant Lloyd then threatened to throw the defendant out of the window unless he confessed his guilt (424, 439, 400, 629, 633, 634, 658, 661, 663, 945, 946).

The officers typed up statements which included an admission of the defendant's guilt and told the defendant to sign it (425). Finally, the defendant gave in and signed the two prepared typed statements without reading them (441, 442, 653). At trial the defendant unequivocally denied the truth of the information contained in these statements (442). From Baldwin the defendant was next transported to Mineola Police Headquarters. En route he was beaten once again by Parker and Toner (443, 444).

Upon entering Mineola Police Headquarters the defendant was asked by the desk sergeant on duty if he wished to go to the hospital (444). The defendant replied in the affirmative and told the desk sergeant that he had been beaten by Parker and Toner (445). The desk sergeant immediately ordered Parker and Toner to take the defendant to the Nassau County Medical Center (445). Before driving the defendant to the hospital, however, Parker and Toner first threatened to use physical force on the defendant's penis. They then beat the defendant once again both at Police Headquarters and en route to the hospital (445-447, 672). Later, at the hospital Parker and Toner told the attending physician that the defendant's injuries were caused by his having slipped and fallen (449).

While being examined at the hospital the defendant emitted blood in his urine sample (450). Further, the defendant made complaints to the examining physician about severe pain resulting from the constant beatings. He also told a police officer at the hospital that he had been beaten (461). When he was brought to the Nassau County Jail from the hospital, he also complained to the doctor there that he had suffered injuries as a result of police beatings (452). At trial the defendant stated that as additional results of these beatings he had suffered a severe headache and temporarily lost the use of his arms and legs (451).

MICHAEL MASSELL stated that he was a Detective with the Nassau County Police Department, currently assigned to the Scientific Investigation Bureau (677). In that capacity he has the responsibility of developing photographs (678). At trial he testified that a print of a photograph of the defendant allegedly taken at 3:26 P.M. on October 20, 1973 showed a white line located over the defendant's right temple (684). In Massell's opinion, this line was probably the result of dust in the photographic laboratory. However, the print also indicated a mark in the left eye of the defendant which the witness was unable to identify as an imperfection (689).

ARTHUR LLOYD, a Detective Sergeant with the Nassau County Police Department, testified that on October 20, 1973 he had seen the defendant in the First Precinct station house in the company of Officers Furno, Morrissey, Woessner, and Parker (812, 813, 836, 840, 841, 846, 847). At no time did Lloyd see anyone strike the defendant nor did he observe any injuries on the defendant (814-816, 853).

MARIO FURNO, a Detective with the Nassau County Police Department, testified that on October 20, 1973, he arrived at the First Precinct station house at approximately 8:55 A.M. and saw the defendant handcuffed to a desk and seated on the floor (861, 862, 875, 880). Before questioning the defendant, Furno advised him of his constitutional rights (865-868, 879, 880, 882, 884-889). Furno stated that the defendant appeared at first not to understand the word "attorney" and that he (Furno) felt that the defendant did not completely understand the Miranda warnings when he first read them to him (865, 866, 879, 882, 884, 888). When told that if he couldn't afford a lawyer the County would provide one, Collins asked which one and was told that either Legal Aid or a court-appointed attorney would be assigned. After Furno asked the defendant whether he wished to talk to a lawyer at that time, the defendant replied by asking Furno if he could advise him of an attorney whom he could call. Furno stated that he could not recommend a specific attorney (886, 889). Furno immediately asked the defendant whether he understood his rights, to which the defendant answered in the affirmative (886, 887). Not satisfied with this answer, Furno quickly read the defendant his rights a second time (886, 887, 890). This time, when Furno asked the defendant whether he understood his rights, the defendant said yes but "kept shrugging his shoulders" (890, 892). Furno then asked the defendant if he was sure that he understood his rights because he (Furno) was going to ask him questions about this case (890, 892). And without more, Furno proceeded to interrogate the defendant (892).

In response to Furno's questioning, the defendant said that he had been with his girlfriend and had been carrying his shoes.

Later, the defendant stated to Furno that he had been out shooting dice (886, 894-898). Shortly thereafter, Detective Morrissey came into the room and entered the conversation (869). First, Morrissey advised the defendant of his rights and asked him the extent of his involvement.. The defendant denied any guilt (870, 898, 907). Several minutes later, after everyone had left the room, except for Morrissey and the defendant, Furno overheard the defendant say that he was ashamed of himself (871, 905, 906).

While Furno was with the defendant, he never saw anyone strike the defendant (871).

JURY TRIAL

JOHN MEEHAN testified that on October 20, 1973 he was the detective with the Nassau County Police Department in charge of an investigation into an alleged crime occurring on that day at 161-A North Main Street, Freeport (89)*. When Meehan entered the laundromat located at that address on October 20, 1973 he saw one shoe belonging to Eugenia Kusky on a bench inside the store (104, 106, 124). He later saw her other shoe in the rear lot behind the building (124). Toward the rear of the laundromat Meehan saw a substance resembling blood on the floor (107). Later that day, the witness met Eugenia Kusky at the Freeport Police Station wearing a red coat which was ripped (116, 117).

The remainder of Detective Meehan's trial testimony was substantially in accord with his prior testimony at the Wade-Huntley hearing.

CHARLES PARKER testified at trial substantially in accord with his prior testimony at the Wade-Huntley hearing.

VINCENT TONER testified at trial substantially in accord with his prior testimony at the Wade-Huntley hearing.

CHARLES FRAAS testified that he was a member of the Biological Section of the Scientific Investigation Bureau, Nassau County Police Department (346). On October 22, 1973 he examined and tested blood samples taken from the floor of

*Refers to Minutes of Jury trial

a laundromat located at 161 North Main Street, Freeport (350, 351). Frass concluded that the samples were human blood, type O (352-354, 391). He also examined certain vaginal slide samples labeled with the name Eugenia Kusky, and he concluded that sperm was present on one of these slides (355-359, 395).

The witness examined the clothing allegedly worn by the complainant on October 20, 1973. Although a yellow starchy stain was found on the crotch area of the panties, no spermatozoa was found to be present (365, 366, 373). Also, he found no spermatozoa and no blood on her bra, her pantyhose, her slacks, or on her shoes. He did find some unidentified type of blood on her blouse, but no spermatozoa (366-373). Fraas also had occasion to examine the defendant's clothing as well as the complainant's. He found an unidentified type of human blood stain on the defendant's jacket and on the rear portion and heel of his right shoe, but no spermatozoa (370, 373-384, 390, 391).

As to the spermatozoa which he had found on the complainant's vaginal smear, Fraas analyzed the anatomical structure (morphology) of the spermatozoa and concluded that out of the ten spermatozoa which he had found, one was bisophallic and only one was elongated (tapered) (369-401).

MARIO FURNO and JOSEPH MORRISSEY testified at trial substantially in accord with their prior testimony at the Wade-Huntley hearing.

EDWARD SURRAGO, M.D., testified that he was a first year resident in obstetrics and gynecology at the Nassau County

Medical Center (524). At approximately 8:30 A.M. on the morning of October 20, 1973 Dr. Surrago examined the complainant, Eugenia Kusky, in the hospital emergency room (525). This examination revealed that Kusky had multiple bruises on her head and face, some swelling at her jaw and numerous body bruises and scratches (526-534). Surrago took two vaginal slides of the complainant, one of which revealed spermatozoa (529, 531, 536). The presence of this spermatozoa indicated that intercourse had occurred sometime within the past seventy-two hours (532, 535). A sample of Ms. Kusky's blood was taken at the hospital and it was found to be type O (533).

STANLEY MAZYCK testified at trial substantially in accord with his prior testimony at the Wade-Huntley hearing.

EUGENIA KUSKY testified at trial substantially in accord with her earlier testimony at the Wade-Huntley hearing.

TAHMOURES FIROOZI, M.D., testified substantially in accord with his prior testimony at the Wade-Huntley hearing.

JOHN MACLEOD, Ph.D., testified as an expert witness for the defendant. The recipient of a doctor of philosophy degree in physiology, Dr. Macleod is Professor Emeritus of Anatomy at the Cornell University Medical College and a research specialist in human fertility (788, 789). On March 16 and March 30, 1974 Dr. Macleod examined the ejaculate of the defendant and concluded that the defendant's ejaculate presented a distinctive pattern of seminal cytology, as approximately 40% to 47% of his cells were of the acutely tapering variety with elongated heads (794, 795, 798, 799).

While stress may sometimes affect the percentage of tapering sperm found in the ejaculate, the particularly high percentage of the tapering forms in the defendant's sperm is in large measure a result of his varicocele condition, which predated the crime in question (795, 798, 808, 871). Thus, in Dr. Macleod's opinion, the defendant's high percentage of tapered variety cells was most likely the same, within a swing factor of five percent, on October 20, 1973 as on March 16 and 30, 1974 (800, 805, 811-817, 828, 829). This is so because the defendant's tapering percentage is the result of a distinctive sperm morphology that is not likely to change throughout his life (811).

According to Dr. Macleod a vaginal smear is a far better representation of spermatozoa than a seminal smear (836, 837). Thus, if ten spermatozoa were found in a vaginal smear taken after intercourse between a woman and a man with a spermatozoa tapering from percentage between 40% and 47%, Dr. Macleod would expect from two to five of the cells to be of the tapering variety (810, 837). Further, given the victim's vaginal smear showing only one tapered head spermatozoa out of a sample of ten spermatozoa and the permanency of the defendant's sperm morphology, Dr. Macleod concluded that the spermatozoa found in the victim's vagina was probably not that of the defendant (836, 838).

LOUIS H. PRIMAVERA, Ph.D., testified that he held a doctorate degree in experimental psychology and was an expert in the field of statistics (876).

MICHAEL MASSELL, a Detective with the Scientific Investigation Bureau of the Nassau County Police Department, testified that white spots which appeared on People's Exhibits 25, 26 and

27 were the result of dust spots on the negatives. On Exhibits 25 and 27, however, there was a one inch mark above the defendant's eyebrow which Massell was unable to identify as an imperfection (923, 924).

POINT ONE

APPELLANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS THEY WERE MADE SUBSEQUENT TO A REQUEST FOR COUNSEL AND PRIOR TO AN OPPORTUNITY TO CONFER WITH COUNSEL

If a defendant indicates "in only manner and at any stage" of custodial interrogation that he wishes to consult with an attorney, "the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 444-445, 474 (1966). "At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474.

Appellant contends that his requests to Detective Furno to recommend an attorney constituted a request for the assistance of counsel and that the questioning which followed by Detectives Furno, Morrissey and Mazyck was, therefore, improper. Accordingly, appellant's statements should have been suppressed.

A. Appellant Requested The Aid Of Counsel

Upon arresting the defendant at approximately 6:00 A.M. on the morning of October 20, 1973, Police Officer Charles Parker advised Collins of his constitutional rights (Minutes of Wade Huntley Hearing, pp. 99-102, 175). In response to Parker's questioning whether the defendant understood his

rights and whether he wished to answer any police questions, the defendant remained mute (Id., pp. 102, 170, 171). Still later, in response to Parker's question whether he (the defendant) was involved in an assault on a woman, the defendant steadfastly denied any guilt (Id., pp. 102-103, 176, 188).

Parker then took the defendant to the Freeport Police Station where at approximately 6:30 A.M. Police Officer John Meehan advised the defendant of his rights. Although the defendant was dry-heaving and appeared to be intoxicated, he stated that he understood his rights and again denied any guilt (Id., pp. 690-693, 704-707, 721, 722).

Ninety minutes later, Officer Parker transported the defendant to the First Precinct Station House where he was questioned, beginning at 9:00 A.M., by Detective Mario Furno (Id., pp. 861-863, 875, 880). Before questioning the defendant, Furno advised the defendant of his constitutional rights (Id., pp. 865-868, 879, 880, 882, 884-889). The defendant appeared as if he did not understand the meaning of the word "attorney" and, according to Furno, seemed confused by the Miranda warnings (Id., pp. 865, 866, 879, 882, 884, 888). When told that an attorney was a lawyer, the defendant interrupted Furno's Miranda recitation and asked Furno when he could make a phone call (Id., 885). When told that if he

couldn't afford a lawyer the county would provide one, appellant asked which one and was told by Furno that either Legal Aid or a Court appointed attorney would be assigned(Id., 867, 886). Furno then asked Collins if he wanted to talk to a lawyer to which Collins replied "can you recommend one to me" (Id., 867, 886). In response, Furno inexplicably told the defendant that he could not recommend an attorney as he was not allowed to do that (Id., pp. 867, 885, 886).¹

At this point Furno immediately asked the defendant whether he understood his rights, to which the defendant answered in the affirmative (Id., pp. 886, 887). Believing, however, that the defendant did not understand his rights (Id., pp. 865, 866, 870, 879, 882, 884, 886-888), Furno quickly read the defendant his rights for a second time. This time, when Furno asked the defendant whether he understood his rights, the defendant said yes, but "kept shrugging his shoulders" (Id., pp. 890, 892). Without more, Furno immediately proceeded to ask the defendant questions (Id., pp. 890, 892). Several minutes later, Detective Joseph

¹There is some confusion in the testimony of Furno as to whether Collins asked for a recommendation of counsel one or two times. (Compare 886 with 879). However, Furno clearly testified that in response to the question, "Do you want to talk to a lawyer now?", Collins asked, "Could you advise me of which one?" (886). It should also be noted that the Nassau County Police Department precincts have in their possession telephone numbers of staff attorneys of the Legal Aid Society of Nassau County and that these attorneys have in fact been called by Nassau County police officers to appear at line-ups and interrogation sessions on behalf of indigent persons charged with crimes. Further, from Detective Furno's own testimony, he believed that the defendant was an indigent person who would be eligible for representation by the Legal Aid Society (Id., p. 867).

Morrissey entered the room containing the defendant and quickly advised him of his rights. After the defendant replied to Morrissey that he understood his rights, Morrissey questioned the defendant as to the crime in question and obtained inculpatory statements from the defendant (Id., pp. 251-253, 262, 268, 269, 279, 283). Approximately forty-five minutes later Collins made additional inculpatory statements to Detective Mazyck (Id., p. 290).

When the defendant asked Detective Furno to recommend a lawyer for him, it was obviously a request for a lawyer to represent him on the charge for which he had been arrested. People v. Superior Court, 15 Cal. 3d 729, 542 P. 2d 1390 (1975), cert. denied, 45 U.S.L.W. 3249. Miranda's test of what constitutes a request for an attorney is quite broad, "If...he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. 444-445 (emphasis added). It seems clear that defendant's request to Detective Furno should have been treated as a request for a lawyer and all questioning should have ceased. Obviously, the defendant was not asking Furno to recommend a lawyer for the drafting of a will or the filing of a tort claim. Rather, defendant was in station house custody, surrounded by numerous police officers as the prime suspect on a rape and assault charge. The defendant's request for the recommendation of an attorney must be held to have been direct requests for the aid of counsel prior to police questioning. Justice Shapiro, dissenting in the instant

case in the Appellate Division stated, "defendant's request for the recommendation of an attorney....was not only tantamount to, but was a direct request for, the aid of counsel (cites omitted)...All questioning should have ceased at that point..." People v. Collins, 48 A.D. 2d 841 at 842 (2d Dept., 1975).

In People v. Superior Court, supra, the California Supreme Court was confronted with a factual circumstance remarkably similar to that in the instant case. Defendants therein, being confronted by Deputy Sheriffs, remarked either, "Do you think we need an attorney" or "I guess we need an attorney," to which one Deputy said, yes. 542 P. 2d at 1392. One defendant then asked whether the Deputy could recommend an attorney. The Deputy answered that he could not, but advised defendants that several local attorneys were listed in the phone book and suggested that they choose one to call. Advised by the Deputies that defendants could make the officers' jobs easy or tough, the defendants were left alone for five or ten minutes with access to the telephone directory. When the officers returned, defendants were asked whether they had made any decision. One defendant responded that he would talk. Subsequently both confessed together. The California Court found the remarks of the two defendants sufficient to come within the broad language expressed in Miranda, thereby excluding

any subsequent statements. 542 P. 2d at 1394; see People v. Randall, 1 Cal. 3d 978, 955 (1970).

Appellant's request in the instant case was virtually identical to that in People v. Superior Court. However, the District Court, in denying appellant's application for a writ of habeas corpus, distinguished the California case on the basis of the preliminary remarks of the defendants therein ("Do we need a lawyer" or "I guess we need a lawyer") and the officers statement that their job could be made "easy or tough". See Appendix for Relator-Appellant, P.A-32. A careful reading of the California case, however, negates the viability of the distinguishing characteristics, as the Court held, "...defendants' subsequent specific request that the deputies recommend an attorney indicates both their continuing concern and their specific and pointed desire to consult counsel." 542 P. 2d at 1394 (Emphasis added).²

The District Court's further reliance on People v. Whitman, 182 Colo. 6; 510 P. 2d 432 (1973), and United States v. Bettenhausen, 499 F. 2d 1223 (10th Cir. 1974), is inappropriate. See Appendix for Petitioner-Appellant, p.A-33. In Bettenhausen, defendant, in the process of being interviewed by Special Agents of the Internal Revenue Service, inquired of one Special Agent if he was in trouble and if he needed a lawyer. The Agent's response to the effect that he could not tell him and that it would be his decision was held not prejudicial to defendant's rights. The Court's holding in

²Similar to the defendant in People v. Supreme Court, Collins too made preliminary statements regarding counsel. See Appellant's Brief, p. 24-25.

Bettenhausen, however, has no application to the instant case as it specifically held that Bettenhausen was not in custody for purposes of invoking his rights under Miranda. 499 F. 2d at 1231 (Emphasis added). Clearly, under Miranda, an interrogators obligation to cease questioning following a request for counsel only attaches in the setting of "in custody interrogation" Miranda v. Arizona, supra at 474.

In People v. Whitman, supra, defendant, while being treated in a Denver hospital, had a discussion with a deputy sheriff assigned to general guard duty concerning how and where Whitman could contact an attorney. The deputy informed Whitman that he could not make a recommendation. Whitman subsequently made a statement to investigating police officers. The Court in denying suppression, pointed out that the case was Pre-Miranda, cited Frazier v. Cupp, 394 U.S. 731, as the prevailing authority and made particular mention of the fact that Whitman's request was not made to any of the investigating or interrogating police officers.

The Colorado Court's reliance on Frazier v. Cupp, supra, is a strong indication that they would have suppressed Whitman's confession had it been post-Miranda. In Frazier, the defendant had begun to respond to interrogation when he said, 'I think I had better get a lawyer before I talk anymore. I am going to get into trouble more than I am in now.' The officer replied,

'You can't be in any more trouble than you are in now' and continued to take a full confession. 394 U.S. at 738.

Petitioner argued that his statement about obtaining counsel was sufficient to require the police to halt questioning and obtain a lawyer for him. As Frazier was a pre-Miranda case the confession was not suppressed. See Johnson v. New Jersey, 384 U.S. 719 (1966) (Miranda is not to be applied retroactively). However, the Supreme Court, referring to petitioner's request for suppression, held the result might be different had Miranda been applicable:

We might agree were Miranda applicable to this case, for in Miranda this Court held that '[i]f...[a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.' 394 U.S. at 738 (cit. omit.).

The broad language of Miranda clearly encompasses Collins' remarks to Detective Furno and requires a finding that a request was made for assistance of counsel. Accordingly, all questioning should have ceased until counsel was provided. Miranda v. Arizona, supra at 444 - 445, 474.

B. Having Requested Counsel, Appellant Did Not Waive His Rights Under Miranda

The New York Court of Appeals, in affirming the conviction in the instant case, noted that "were the matter confined

to the conversations between Detective Furno and defendant, the conclusions of...[Justice Shapiro]...would be irresistible," [People v. Collins, 38 N.Y. 2d 968, 970 (1976)], thereby agreeing with appellant's contention that a request for counsel was made. The Court went on to hold, however, that because there were many consultations between the defendant and other police officers the evidence supported the finding that the defendant waived the right to counsel. 38 N.Y. 2d at 970.³ Having requested the assistance of counsel, appellant could not have waived the assistance of counsel under the facts of this case.

The leading case on the issue of the resumption of questioning once a person in custody has indicated that he does not want to waive his Miranda rights is the recent Supreme Court decision in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975). In that case the defendant, who had been arrested on a robbery charge, was given the Miranda warnings and then stated that he did not want to answer any questions. Interrogation ceased at that point, but subsequently Mosley was fully

³ The District Court in denying appellant's writ of habeas corpus concurred in the result of the New York State Court of Appeals, although apparently not finding that a request for counsel was made. See Appendix for Petitioner-Appellant, p. 831, 833.

advised of his Miranda rights and was asked if he wanted to make a statement not about the robbery charge, but about a murder. Mosley then made a statement implicating himself in the homicide and the Supreme Court held that this statement was properly admitted in evidence at Mosley's trial on the murder charge.

In making this decision, the Mosley Court drew a sharp distinction between two different ways in which a person in custody can indicate that he does not want to waive his Miranda rights. The individual who is being held can simply state that he wants to remain silent or he can indicate that he wants to have the assistance of an attorney. Mosley, the defendant before the Court, fit into the former category because at no time during the period when he was initially advised of his rights and questioned about the robberies "did Mosley indicate a desire to consult with a lawyer." 423 U.S. at 97.

Thus, in upholding the admission of Mosley's statement, the Court established guidelines for the resumption of questioning when the person in custody simply states that he wants to remain silent. On the other hand, the Mosley Court noted the procedures to be followed when the person in custody expresses the desire to consult with counsel had already been detailed in the following passage from the Miranda opinion:

If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's fifth Amendment privilege so long as they do not question him during that time.

Miranda v. Arizona, supra 384 U.S., at 474, quoted in Michigan v. Mosley, supra 423 U.S. at 101 n. 7. In other words, once the person in custody indicates that he wants to consult with counsel before answering questions, a per se rule takes effect requiring that all interrogation must cease until an attorney is provided. [All members of the Supreme Court are apparently agreed on this point. 423 U.S. at 104 n. 10; 109-110 (White, J., concurring); 116 n.4. (Brennan, J. dissenting).] A number of recent cases have noted, discussed, and reaffirmed this distinction made in Mosley. Egs. United States v. Womack, 542 F. 2d 1047(9th Cir. 1976); United States v. Kinsman, 540 F. 2d 1017 (9th Cir. 1976); United States v. Flores-Calvillo, 19 Cr.L. 2405 (9th Cir. 1976); United States v. Maddox, 413 F. Supp. 60 (W.D. Okla. 1976).⁴

⁴The recent United States Supreme Court decision in Brewer v. Williams, _____ U.S. _____ (1977); 20 CrL 3095 does nothing to alter the distinction made in Mosley. Brewer was decided entirely upon the Sixth Amendment right to counsel; the Court specifically declining to review whether any Fifth Amendment Miranda violation had taken place. 20 CrL at 3098.

Accordingly, when appellant requested counsel in the instant case, all questioning should have ceased. The statements elicited from Collins followed shortly thereafter and formed a part of a continuous interrogation process. See Clevis v. Texas, 386. U.S. 707, 710. Therefore, those statements must be suppressed and the decision of the District Court reversed . Miranda v. Arizona, supra.

POINT TWO

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS THE PEOPLE DID NOT MEET THEIR BURDEN OF SHOWING DEFENDANT'S CONFESSION VOLUNTARY BY A PREPONDERANCE OF THE EVIDENCE.

In a criminal prosecution, whether state or federal, there must be an independent determination by the trial judge of the voluntariness of any inculpatory statements made by the defendant. Jackson v. Denno, 378 U.S. 368 (1964), People v. Huntley, 15 N.Y.2d 72 (1965). In the instant case, defendant had a Huntley hearing at which the trial judge held the defendant's confessions voluntary. Where the proper constitutional standard has not been applied by the State Court,¹ the defendant may seek relief in the federal courts by petitioning for a writ of habeas corpus, Swenson v. Stidham, 409 U.S. 224, modified 410 U.S. 904, on remand 506 F.2d 448 (1972); U.S. ex rel Headley v. Mancusi, 392 F.Supp. 187 (S.D.N.Y. 1974); cf. Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner contends that the presumption of correctness given to the State Court's Findings of Fact

¹ The New York standard for voluntariness is "beyond a reasonable doubt," People v. Huntley, supra. The federal standard for voluntariness is a "preponderance of the evidence," Lego v. Twomey, 404 U.S. 477 (1972). Petitioner contends that the record clearly shows that the Petitioner did not prove the confessions voluntary at the Huntley hearing under either standard.

and Conclusions of law under 28 U.S.C. 2254(d) shall not apply because the record below does not support the factual determinations made by the trial judge, cf. 28 U.S.C. 2254(d)(8). In addition, as a matter of law, the record below does not support the conclusion that the confessions were voluntary. Rather, the trial judge should have found the confessions involuntary as a matter of law under Lego v. Twomey, supra.

Petitioner not only testified at the Huntley hearing ² that he had been beaten into confessing but also presented objective evidence of injury, namely the testimony of the Doctor who treated defendant during his six day stay in the hospital for his injuries. The petitioner was admitted to Nassau County Medical Center on October 20, 1973, approximately 11 hours after his arrest, complaining of back pains. Examination of the petitioner showed a 1 inch laceration above his left eye and urine tests showed the presence of red blood cells in his urine.

Substantiating the petitioner's claim is the testimony of Tahmoures Firoozi, M.D., a resident in urology at Nassau County Medical Center (Hearing**p. 472). Dr.

² Defendant testified that he had been beaten by Police Officers Parker, Toner, Mazyck and Lloyd prior to making any inculpatory statements (Minutes of Wade hearing, pp. 416, 419, 421, 427, 439, 440, 456, 531, 532, 543-546, 629, 633, 634, 658, 661, 663 945, 946) on the face, shoulders, torso and legs.

**"Hearing" refers to the Minutes of the Wade-Huntley Hearing held March 28, 1974. "Trial" refers to the Minutes of Trial.

Firoozi testified that he was called in as a consultant (Hearing p. 483) and examined the petitioner in the Emergency Room of the hospital at approximately 4:00 or 5:00 P.M. on October 20, 1973 (Hearing pp. 483-483; Trial p. 765). He found a small hematoma, approximately 1 inch in length (2 1/2 centimeters, 474, 499, 505) in petitioner's left eyebrow and bilateral CVA (flank) tenderness, i.e. tenderness on both the right and left side of the petitioner's body between the rib cage and the spine (Hearing p. 474, 492; Findings of Fact p. 1004). The Doctor then testified that the hematoma was a relatively fresh injury because of the presence of blood in it (Hearing p. 474, 499, 505, 510).

Even more important as corroboration for petitioner's allegations of police brutality, Dr. Firoozi testified that a urine anaylsis, done on October 20, 1973 - upon the petitioner's complaint of pain in the lower back region revealed the presence of numerous red blood cells in the defendant's urine. (Id. p. 474, 475, 484). In fact, the number of red blood cells in the petitioner's urine was so great the laboratory report came back "TNTC" ("too numerous to count") (Hearing 481).

The doctor testified that, ordinarily, the presence of red blood cells in the urine is caused by infection, tumor or trauma. In the petitioner's case, however,

the doctor ruled out both infection and tumor as cause for the presence of the blood cells (Id. p. 475, 476) because those tests that would indicate the presence of tumor or infection came back negative (Id. 476). In addition, the amount of red blood cells in the petitioner's urine gradually decreased during the 6 days he remained in the hospital, also indicating the cause of the red blood cells was not tumor or infection (Hearing p.507; defendant's Medical Record, Exhibit B).

Thus, Dr. Firoozi concluded that a beating could very likely have accounted for the presence of red blood cells in the petitioner's urine and that such a testing would most likely have been a recent one (Hearing p. 476, 477, 507, 508).³

Clearly, then, by virtue of the testimony of Dr. Firoozi, as well as defendant's testimony, the petitioner placed in issue at the Huntley hearing the existence of injuries which were objectively verifiable and consistent with petitioner's claim of police brutality.

Though in New York there is a higher standard of proof of voluntariness required at the pre-trial hearing than at the federal level, New York has also evolved a

³Dr. Firoozi also testified while a severe trauma, such as would result from kicks and other blows to the body, might result in damage to other organs, this would not necessarily occur in all or even most of the cases and could in fact occur only in "some" of the cases (Hearing 513, 514, 515, 516).

prophylactic rule of law to be applied where a defendant presents objectively verifiable physical injuries which could have been obtained while in police custody, People v. Valletutti, 297 N.Y. 226 (1948); People v. Barbato, 254 N.Y. 170 (1930), People v. Yarter, 51 A.D.2d 835 (3d Dept., 1976). The federal courts appear to have no such correlative rule. Understandably, federal courts may be reluctant to cast judgment on a lower court determination where the issue is largely one of credibility, cf. U.S. ex rel Cerullo v. Follette, 416 F.2d 156 (2d Cir. 1969). However, in the instant case, the allegations of police brutality were not merely the occasion for a swearing contest between the defendant and police. The petitioner showed unmistakable signs of injury, namely a 1 inch hematoma above the left eye and red blood cells in his urine for which he was hospitalized for six days. (Medical Record of defendant; Exhibit B Hearing). The Assistant District Attorney conceded, "We cannot in any way explain this particular injury" [i.e. the hematoma above the left eye, Hearing p. 983]. In trying to explain the presence of red blood cells the Assistant District Attorney stated that Dr. Firoozi stated there were many causes of red blood cells and that one of those causes might be beatings to the bladder and renal area but "there was no evidence of beating in that area." (Hearing p. 984). Despite the

Assistant District Attorney's summary of the Doctor's testimony, Dr. Firoozi never stated that there was no evidence that defendant had been beaten.⁴ The doctor stated that the red blood cells were not due to infection because another test taken for infection proved to be negative (Hearing, p. 476). The doctor also testified it appeared that defendant did not have a tumor because the defendant's kidney x-ray was normal (Hearing p. 476). The Doctor testified, when asked by the Court (Id. p. 476) that a history of beating could account for the presence of red blood cells in the defendant's urine (Id. p. 477). The Doctor also ruled out past injury to the defendant as accounting for the red blood cells "[b]ecause if he had injury in the past, still he should have RBC [red blood cells] in the urine on the day he was discharged." (Id. 507). In fact the amount of red blood cells in defendant's urine had greatly decreased by the time he was released (Hearing 507, Medical Record, Exhibit B). Furthermore, the Court asked the Doctor:

COURT: "[W]ould you say, considering all of the things that you just mentioned, that the red blood cells in the urine were the result of recent trauma or of old trauma?"

⁴ It must be noted that in coming to a final diagnosis of "left renal contusion" (Medical Record) the Doctor did more than merely take defendant's word for it that he had been beaten. The Doctor reached his conclusion based on the total medical history supplied to him by the defendant. This history included the fact that defendant had had a hernia repair in the past and had recently undergone surgery for varicocoele as well as the defendant's complaint that he'd been beaten. The Doctor specifically ruled out varicocoele (a swelling of the left hemioscrotal area) as causing red blood cells in the urine (509).

THE WITNESS: "I would say it's probably due to recent trauma." (Id. p. 508).

Despite the medical testimony of Dr. Firoozi, the only medical expert to testify at the Huntley hearing, the People never showed where the defendant's injury came from.

In U.S. ex rel Cerullo v. Follette, 416 F.2d 156 (2d Cir. 1969), cert. den. 397 U.S. 1000, the facts were analogous to those in the instant case.⁵ In Cerullo, the Court studied the record after a second evidentiary hearing had been held by the District Court and held the defendant's confession voluntary. The Court relied on a number of factors in reaching its conclusion. First the Court relied heavily on the fact that in Cerullo the defendant, who was arrested on October 4, 1962 did not notify anyone he'd been beaten until May 17 of the following year. Id. 160. When Cerullo was arrested he indicated he'd been hurt to the admitting officer at the Nassau County Jail. On October 5 when Cerullo was examined as part of jail routine he told the jail physician he had fallen down in the police station. Id. 160. In the case at bar however, the petitioner raised his claim

⁵ The standard used by the Court in Cerullo, however, was beyond reasonable doubt as the case was decided prior to Lego v. Twomey, *supra*.

of police brutality at the earliest possible opportunity by stating to the desk Sergeant at Mineola police headquarters (on the same day as his arrest) that he had been beaten by the police, that he had back pains and that he wished to see a doctor (Findings of Fact p. 1003).⁶ Thus the petitioner raised his claim at the earliest possible moment he felt he feasibly could.

In Cerullo, the Court also relied on the fact that the only evidence substantiating the defendant's claim was the testimony of the jail doctor (who had subsequently died and therefore had only testified at the evidentiary hearing held at the state level). Id. 160. The Court did not find the doctor's testimony conclusive because the doctor's diagnosis of contusion was based solely on the defendant's subjective complaints. Id. 164. The x-rays taken at the hospital proved negative and the defendant was returned to the Jail right away Id. 161. In the instant case however, the petitioner had objective verification of his injuries: namely a 1 inch cut over the left eye and urine tests which indicated internal bleeding (Trial pp. 768-769). The Doctor's diagnosis

⁶ It is generally recognized that a prompt outcry by the defendant is some evidence of the truth of the allegation of police brutality, cf. People v. Leonti, 18 N.Y.2d 384, 390 cert. denied 387 U.S. 946, reh. den., 389 U.S. 890; Richardson on Evidence, 10th Ed., §542(1).

was based on substantially more than the defendant's word. In addition, the defendant was hospitalized for six days until this red blood cell count decreased.

It would be remarkably coincidental if the petitioner's chose an area of his body to complain he was beaten in and which laboratory tests indicated he was beaten in unless it was highly likely he was beaten. Petitioner is not a medical student, nor versed in the sciences of biology and anatomy. He did not have blood in his urine which he could visibly see and therefore link to a fabricated injury. The defendant knew only that he was in pain. Subsequent tests showed internal bleeding and verified petitioner's complaint.

In Cerullo, the court also relied on photographs taken of the defendant to show defendant had not been beaten. In the instant case, too, the Court relied heavily on mug shots taken at 3:26 P.M. on October 20, 1973 to belie the presence of injury. However, Dr. Firoozi testified that the injury over petitioner's eye was visible when he saw petitioner at approximately 4:00 P.M. on October 20, 1973 (Hearing p. 483). There was but a 40 minute time lapse between the time the defendant's photos were taken and the time he was brought to the emergency room of the hospital. This

very brief period makes it most unlikely that the eye injury occurred after the photos were taken but before defendant's admission at the hospital. Furthermore, the mug shots do not rule out the presence of the injury at the time the photos were taken as Detective Michael Massel, a police photographer who made prints from the negatives, acknowledged the presence of a mark located, significantly, above the defendant's left eyebrow which the witness was unable to state was a photographic imperfection (Hearing 689; Trial 923, 924) ⁷.

Furthermore, even if the injuries petitioner claims to have suffered are not discernible from a face portrait, this did not prove that the defendant was not beaten around the torso - corroboration of which showed up in the defendant's urine analysis. If the defendant was beaten in one part of his body rather than another, or the injuries showed up more clearly in one part of the body than another, it is no less odious to the notion of due process.

The court in Cerullo also relied on the fact that defendant's handwriting appeared normal to indicate he was not beaten. U.S. ex rel Cerullo v. Follette,

⁷
In addition defense counsel objected to the courts characterization of the slide of the defendant as showing no discernible injuries to his face on the ground that the slide was too dark and unclear to be dispositive of the issue (Hearing, 808, 809).

Id. 162. In the instant case, the trial judge also relied on defendant's handwriting (on the confessions) to dispute the fact that defendant was beaten (Findings of Fact p. 1013). However, there is no evidence indicating the relationship between a beating and the effect on one's handwriting. Furthermore, the condition of the petitioner's handwriting does not negate the presence of the red blood cells nor the hematoma above the petitioner's eye. A beating to elicit a confession does not become constitutionally acceptable because it does not render the defendant senseless.

The trial court sought to explain the presence of petitioner's injuries thus:

The presence of the red blood cells in the urine is also consistent with injury, whether or not self inflicted, suffered by the defendant after the confessions were obtained or prior to his arrest... It is important to note that the rape was accompanied by violence, during which time the trauma resulting in the injury could have occurred...(Findings of Fact pp. 1011, 1012).

Petitioner submits that these conclusions with regard to the presence of the red blood cells in the defendant's urine as well as the hematoma, are merely speculative and not supported by the record. First, a severe beating was the trauma most likely responsible

for the presence of red blood cells in the urine (Hearing pp. 476, 477). There is no evidence that the defendant ever resisted arrest or had an opportunity to inflict injuries upon himself. The police officers who were with defendant on October 20, 1973 testified that the defendant received no injuries while in their custody (Hearing Parker 122, 124, 939-940; Toner 334; Morrissey 281-282; Mazzyck 302-303; 803; Meehan 691, 695-699; Lloyd 815-816; Hendricks 915-916). Police officer Parker testified that the defendant was in his custody virtually the entire time from the moment he stopped him on the street and arrested him until the petitioner's admission to the Nassau County Medical Center. Parker escorted defendant to Freeport, then to Baldwin, to Mineola Police Headquarters and finally to the hospital and stated that defendant did not fall, was not pushed nor in any way bruised (Hearing pp. 99, 100, 105, 107, 113, 117, 121, 123, 124).⁸

Secondly, the trial court speculated the red blood cells in the defendant's urine resulted from the commission of the rape or as a result of police beatings inflicted after the confession was taken. This conclusion should be rejected. The complainant, Eugenia Kusky testified at the

⁸ Detective Sergeant Lloyd testified that at one point the petitioner was swinging his leg back and forth (Hearing 838). However, the CVA tenderness was bilateral and occurred in the region of the lower back.

hearing and trial that her assailant had used physical force on her person during the commission of the crime. At no time, however, did she resist her assailant with any physical force (Hearing pp. 11, 29, 30, 33, 35; Trial 629-632, 646, 647, 649, 696, 704). Therefore, since the violence which accompanied the rape was directed only at the victim and not the perpetrator, it was not possible for the defendant to have incurred his condition of red blood cells in the urine. The lower courts conclusion is not borne out by the record.

Moreover, it is most improbable that the petitioner was beaten by the police after they had obtained a full confession from him, as was suggested by the trial court (Findings of Fact 1011, 1012). It makes little sense for a police officer to beat a defendant in police custody after the defendant has confessed; once an inculpatory statement has been obtained as it was in the case at bar, the prime motive for police brutality would cease to exist. Cf. Miranda v. Arizona, 384 U.S. 436, 446 n. 7 (1966).

The Court of Appeals, in affirming defendant's conviction noted the record is "troublesome." 38 N.Y.2d 968 (1976). The Court explained the presence of red blood cells in the defendant's urine as being caused by the defendant's recent surgical operation in the groin area.

The only medical expert to testify at trial, however, was Dr. Firoozi and his testimony does not bear out the Courts conclusion. Dr. Firoozi stated:

COURT: "Well, in your opinion doctor, would there be any causal relationship between the operation that you have just described and the red blood cells in the urine?"

THE WITNESS: "No sir, no." (Hearing 478).

Thus, the Court of Appeals explanation for the defendant's injury must also be rejected.⁹

The People did not meet their burden of showing defendant's confessions were voluntary by a preponderance of the evidence. There is no testimony as to exactly how the defendant incurred a hematoma 1 inch long over one eye or red blood cells in his urine. The photographs and handwriting do not provide any probative value or explanation of how defendant incurred these injuries. Therefore defendant's confessions should have been suppressed.

Finally, should this Court find the admission of defendant's statements to have violated the defendant's

⁹ It might appear that the transcript is unclear as to whether the Doctors answer referred to the hernia repair or the varicocele operation. The hernia repair, however, was not recent (Hearing 478). The varicocele operation was recent and it was the Doctor's opinion that this operation would not cause red blood cells in the urine (Hearing 478). In argument the Doctor considered the patient's entire history in coming to his final diagnosis of left renal contusion (Hearing 479). On cross-examination the Doctor again stated that swelling of the varicocele hemioscrotal would not be a competent cause of red blood cells in the urine (Hearing 509).

Fifth and Fourteenth Amendment rights, it should not hold their admission to be harmless error. "[b]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967), Harrington v. California, 395 U.S. 250 (1969). In the instant case, the jury deliberated for one night and half the following day before reaching its verdict (Trial 1102). Though there was an eyewitness identification by the complainant, it is impossible to determine how much weight it held in the eyes of the jury because the victim had observed her assailant for a total of only 7 seconds in the store and for one minute in the dark lot behind the laundromat (Minutes of Hearing, 48, 49, Minutes of Trial, 644-650). It is therefore unlikely that the jury convicted the defendant without relying at least in part on the damaging confessions made by the defendant. Therefore, the standards of Chapman, supra and Harrington, supra have not been met.

CONCLUSION

FOR THE ABOVE STATED REASONS THIS COURT
SHOULD REVERSE THE ORDER OF THE DISTRICT
COURT DISMISSING THE PETITION FOR A WRIT
OF HABEAS CORPUS.

Respectfully submitted,

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